

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

J.P. MASCARO & SONS,
Employer

and

4-RC-20920

INTERNATIONAL ASSOCIATION OF
MACHINISTS & AEROSPACE WORKERS,
AFL-CIO, DISTRICT LODGE 1,
Petitioner

David L. Porter, Grand Lodge Representative,
of Cincinnati, Ohio, for the Petitioner.
Mark S. Shiffman, Esq., (Jackson Lewis LLP),
of Pittsburgh, Pennsylvania, for the Employer.

RECOMMENDED DECISION ON OBJECTIONS

ARTHUR J. AMCHAN, Administrative Law Judge. Pursuant to a January 12, 2005 Notice of Hearing, I heard evidence in this matter on February 3, 2005 in Philadelphia, Pennsylvania.

This case arises pursuant to the Petitioner's objections to the conduct of a December 10, 2004 secret ballot election in an appropriate unit of all full-time and regular part-time drivers, helpers, slingers and mechanics employed by the Employer at its Reading (Berks County), Pennsylvania solid waste collection terminal. The election was conducted in two sessions, the first between 5:00 a.m. and 8:00 a.m. and the second between 4:00 p.m. and 6:15 p.m. Seventy-six ballots were cast; 26 for the petitioner, 41 against and 9 ballots that were challenged.

The objections before me, as set forth in the Notice of Hearing, are as follows:

Objection 1. Pat Mascaro, Sr., Pat Mascaro, Jr., Mike Mascaro and Attorney Bill Fox were viewed standing outside the voting area within 15 feet of the polls intimidating voters as they entered. This was witnessed by various employees and Union officials Gary Anthony and Stephen Miller.

Objection 2. Owner Pat Mascaro, Sr. also intimidated and restrained voters and was quoted as saying before the election in the parking lot, "Do not vote for the union. I will take care of you and your problems." And telling employees "the family will take care of the union guys."

Objection 3. Owner Pat Mascaro, Sr. [made] promises to correct all of the overtime issues and problems if employees voted against the union, in a captive audience meeting.

Objection 4. Supervisors James Martzolf, Al, and Shorty and office workers Mary Beth Reid and Sonya Gorostieta entered the voting area for the purpose of intimidation and to restrain employees. [T]he opportunity for a sterile election was contaminated by this conduct.

5 Objection 5. Employer and its representative had an anti-union sign posted within the election area the morning of the election.

10 Prior to the election, the Employer conducted four mandatory meetings for employees regarding the Union's organizing campaign. The last meeting was conducted on December 8, 2004, two days before the election. The only persons who attended any of these meetings who testified at the instant hearing were the Employer's attorney, Bill Fox, and the Employer's President, Pasquale "Pat" Mascaro, Sr.

15 At one meeting, Fox told employees that they could be permanently replaced in the event of an economic strike. He also said that if they were permanently replaced, the employees would have to pay their own hospitalization and would not receive unemployment insurance benefits. Fox also said:

20 ...that they'd be put on a list for recall, but there was no guarantee that they would be recalled for their position...I didn't say they would never be recalled. I said they could be permanently replaced with other employees and they'd be put on the list, and if a position came open, it would be drawn from that list. It's just like you'd send out letter to the same effect.

25 Tr. 131-32.

30 At the last meeting on December 8, Pat Mascaro, Sr. entertained some questions from employees. In response to one, he told employees that it was obvious to him that "we need to improve some things around here. But the law does not allow me to address those issues." He also drew an analogy between employees selecting the Union and a married couple inviting a third person into bed with them to help them resolve marital problems.

35 The election was conducted in the vending/snack room area of Respondent's Berks County facility. This room is approximately 16-20 feet long and 8-9 feet wide. It is separated from the front door of the facility by a 10-foot wide hallway. Outside the front door, as depicted in Employer's Exhibit 1 is a cement pad or sidewalk which leads to another sidewalk which runs parallel to the face of the building. Beyond the second sidewalk is a parking lot.

40 The voting room is a high traffic area. Indeed, employees normally walk through the vending/snack room on their way between the front door and hallway in front of it and the garage areas behind it. Employees and probably some supervisors walked through the room during polling hours. The employer's in-house attorney, Bill Fox, offered the Board agent a different room in which to hold the election; the Board agent declined the offer. The Union agreed to conducting the election in the snack room.

45 During a pre-election conference which started at about 4:45 a.m., union representatives noticed a flyer relating to the Employer's desire or policy to remain nonunion on the wall of the vending area. When they mentioned the flyer to Fox, he told them to take the flyer down. This flyer was removed from the wall before voting began.

50 Voting began shortly after 5:00 a.m. At various times while the polls were open, a number of company officials were observed standing on the cement pad just outside the front

door to the facility. These included Pat Mascaro, Sr., Pat Mascaro, Jr., a management trainee, Mike Mascaro, the General Manager, Al Cataldi, a supervisor, and attorney Bill Fox. There is no evidence as to how long these individuals stood at the front door with the exception of Cataldi, who stood there for 10-15 minutes shortly after the polls opened.

5

The Employer's President, Pat Mascaro, Sr., and its Attorney, Bill Fox, work at the employer's headquarters in Harleysville, Pennsylvania, approximately 28 miles east of the Berks County facility. They do not have offices at the Berks facility. On election day, December 10, 2004, Fox spent most of his time working on unrelated matters on the second floor of the Berks facility. Pat Mascaro, Sr. arrived at the Berks facility at about 5:15 a.m.

10

Pat Mascaro, Sr., spent virtually the entire day out in front of the Berks facility. Sometimes he was pacing back and forth on the sidewalk in front of the facility, other times he was standing still. On at least one occasion, Pat, Sr., entered the facility and went to the offices on the second floor. To get to these offices he entered the front door, turned left and went up a staircase.

15

Pat Mascaro, Sr., testified that, with one brief exception, he was never closer to the front door than 30-35 feet, or 10-11 yards. He also testified that on average he was 50-55 feet (17-18 yards) from the front door and sometimes as far away as 90 feet or thirty yards. Grand Lodge Representative Stephen Miller testified that at about 7:55 a.m., while the polls were still open, he observed Mascaro at a location 15-20 feet from the front door. I find that on a number of occasions, Pat, Sr., was standing 30 feet or 10 yards from the front door and on other occasions was pacing 5-8 yards back and forth from his original position to locations further away from the front door. On two occasions at trial, Mascaro testified as to his activities outside the Berks facility on election day. On being called to the stand by the Union, Mascaro stated:

20

25

Q. ...did you have any conversations with any of the employees?

A. Through the course of the entire day?

30

Q. Yeah.

A. Yes, there was different points throughout the day. When I got there in the morning, during the morning voting period there was almost no interaction. When I was there, again, I was apprehensive and I wanted to be there to signify the importance of the day. I wasn't there to materially impact what was going to occur that day...I was there and during the morning session hardly anyone really spoke to me. I didn't initiate discussion with anyone. If someone came up to me and said, "Good morning," I'd say "Good morning." If someone walked by me and extended their hand to me I shook their hand. That was like during the morning.

35

40

And when the, as it got prolonged more into the day, and guys who might've voted in the morning went out and ran their routes and came back, and they were guys interested in the outcome of the election, some of those people came up to me and had conversations. And that was out near that huge white sign, I think it's a safety sign. That would've been, you know, maybe 90-100 feet from the building...

45

...I had no conversations with people entering the voting area to cast their vote. My interaction with anyone coming to vote was at most "Good morning," and a couple of guys, maybe two or three guys, put their hand out to me.

50

Tr. 89-91.

The employer's counsel also asked Pat Mascaro, Sr., about his conversations with employees:

5 I had very little conversation with employees during the course of the day...But there came a point in the day, and I don't know really exactly what time, but it was towards the end of the day, when people that obviously voted in the morning and then went out and did their routes came back to the terminal...And after they parked their trucks they stayed there and congregated, waiting for the ultimate determination of the election...

10so towards the end of the day some employees came up to me and initiated discussion, but we were not talking about the election...

Tr. 141-42.

15 While this testimony speaks for itself in establishing that Mr. Mascaro shook hands with employees and had conversations with them, while the polls were still open, he had no way of knowing that he only talked to employees who had already voted. I therefore find that he may have shook hands and conversed with employees who had not yet voted.

20 *Analysis*

I overrule objections 2, 3, 4 and 5 simply on the basis that there is no evidence of record to support the allegations therein.¹ With regard to objection 5, it is clear that the poster in question, even assuming it was objectionable, was removed from the wall before any employees entered the voting area. However, I sustain objection 1 regarding the conduct of Pat Mascaro, Sr., on the day of the election.²

30 Pat Mascaro's day-long presence just outside the front door of the facility was sufficient to warrant setting aside the election even in the absence of the evidence regarding his conversations and hand-shaking with employees. Pat Mascaro, Sr., is President of the employer and had presided at several recent "captive audience" meetings in which he had encouraged employees to vote against representation. Moreover, he did not work at the Berks' facility and had no reason to be there on December 10, 2004 apart from making potential voters aware of his presence. His conduct, therefore, constitutes a nonverbal form of "electioneering."

35 In *Nathan Katz Realty, LLC v. N.L.R.B.*, 251 F. 3d 981, 991-93 (D.C. Cir. 2001), the Court of Appeals reversed the Board and voided a representation election in somewhat similar circumstances. Two union agents sat in a car twenty feet from the door of a church in which the election was taking place, motioning, gesturing and honking at employees as they passed their car. They were parked within what the Board Agent had designated a no-electioneering zone outside the church. The Court read relevant Board precedent to hold that a party engages in objectionable conduct sufficient to set aside an election if one of its agents is continually present

45 ¹ Assuming that I could consider the statements made by Respondent's attorney, Bill Fox, in a meeting with employees regarding the replacement of strikers, it appears that his remarks were not objectionable, *Eagle Comtronics, Inc.*, 263 NLRB 515 (1982).

50 ² Assuming that Pat Mascaro's conduct does not exactly coincide with the precise wording of objection number one, it is sufficiently related to be considered by the Board. Moreover, his day-long presence outside the Berks facility and interaction with employees was fully litigated, *Hollingsworth Management Service*, 342 NLRB No. 50 (2004); *Precision Products Group, Inc.*, 319 NLRB 640 fn. 3 (1995); *Fiber Industries*, 267 NLRB 840 fn. 2 (1983).

in a place where employees have to pass in order to vote. The Court found the union agents' presence outside the church to be conduct sufficient to set aside the election even if the agents did not actually talk to any employee.

5 In one of the cases cited by the Court of Appeals, *Electric Hose and Rubber Company*, 262 NLRB 186, 216 (1982), a supervisor was stationed 10 to 15 feet from the entrance to the voting area. Contrary to Pat Mascaro's situation, this supervisor was near his normal work area. However, the Board held that, "[w]ithout any explanation for a supervisor to be "stationed" outside the voting area, it can only be concluded that his purpose in observing the event was to effectively survey the union activities of the employees and to convey to these employees the impression that they were being watched. This conduct is found to have destroyed the laboratory conditions necessary for the conduct a free and fair election.

15 Another case relied upon by the Court of Appeals is *Performance Measurements Co.*, 148 NLRB 1657, 1659 (1964). In that case, the employer's president stood by the door to the election area so that it was necessary for each employee to pass within 2 feet of him to gain access to the polls. On two occasions, the company president entered the polling area and then immediately left. The Board held:

20 While we agree that the brief forays into the election area alone may not tend to interfere with the free choice of employees, the continued presence of the Employer's president at a location where employees were required to pass in order to enter the polling place was improper conduct not justified by the fact that for part of the time he was instructing supervisors on the release of employees for voting purposes. We find that by this conduct the Employer interfered with employees' freedom of choice in the election.

Also see, *ITT Automotive, a Division of ITT Corp.*, 324 NLRB 609, 623-25 (1997); But see *Mountaineer Park, Inc.*, 343 NLRB No. 135, slip opinion at page 12 (2004), as well as *Standard Products, Inc.*, 281 NLRB 141, 164 (1986).

30 Additionally, I find the election must be set aside on account of Pat Mascaro's hand shaking and conversations with employees outside the Berks terminal. In *Milchem, Inc.*, 170 NLRB 362 (1968),³ the Board enunciated its standard for measuring the effect of conversations between parties to the election and employees preparing to vote.

35 Careful consideration of the problem now convinces us that the potential for distraction, last minute electioneering or pressure, and unfair advantage from prolonged conversations between representatives of any party to the election and voters waiting to cast ballots is of sufficient concern to warrant a strict rule against such conduct without inquiry into the nature of the conversations.

40 ...The difficulties of recapturing with any precision the nature of the remarks made in the charged atmosphere of the polling place are self-evident, and to require an examination into the substance and effect of the conversations seems unduly burdensome and, in this situation, unnecessary. Finally, a blanket prohibition against such conversations is easily understood and simply applied.

50 ³ In the bound volume 170, the name of this case is rendered as *Michem, Inc.* although in the body of the decision the correct name of the employer was *Milchem, Inc.* [with an "l"].

...Additionally, by attaching a sanction to its breach, the rule assures that the parties will painstakingly avoid casual conversations which could otherwise develop into undesirable electioneering or coercion.

5 While the Board in *Milchem* at one point talked in terms of *sustained* conversations with prospective voters and at another point *prolonged* discussions, it made very clear that it was addressing the type of conduct herein.

10 ...this does not mean that any chance, isolated, innocuous comment or inquiry by an employer or union official to a voter will necessarily void the election. We will be guided by the maxim that "the law does not concern itself with trifles." We trust, however, that the parties to elections, in order to obviate the sometimes troublesome task of what is to be considered trifling, will take pains to assure complete compliance with the rule by instructing their agents, officials, and representatives to refrain from conversing with
15 prospective voters in the polling area.

20 Mr. Mascaro's contact and conversations with employees, who may have been prospective voters was not chance or isolated. Although the *Milchem* rule is concerned with conversations within the polling area, I find that it should also apply to the instant situation in which the employer's president came to the facility solely for the purpose of being seen by potential voters and spent the entire day in an area in which potential voters would normally pass. Indeed, the Board may have already applied this rule to conversations outside of the polling area, *Volt Technical Corp.*, 176 NLRB 832, 836-837 (1969).

25 The same considerations which led the Board to eschew an examination into the substance of conversations leads me to conclude no examination is required into whether the employees with whom Mr. Mascaro had conversations were employees who were waiting to vote, or employees who had already voted. Therefore, extrapolating from the *Milchem* rule, I find that the December 10, 2004 election should be set aside and a new election be held.
30

Conclusion

35 Because I have sustained Objection 1 the election must be overturned. This case is remanded to the Regional Director for Region 4 to hold a new election at a time and under circumstances he thinks appropriate. The notice for the new election shall included a statement of the reason for the second election, see *Fieldcrest Cannon, Inc.*, 327 NLRB 109, 110 (1998).⁴

Dated: Washington, D.C. March 16, 2005.

40
Arthur J. Amchan
Administrative Law Judge

45 _____
⁴ Pursuant to Section 102.69 of the Board's Rules and Regulations, any party may, within fourteen (14) days from the date of this recommended decision, file with the Board in Washington, D.C., an original and eight (8) copies of exceptions thereto. Immediately upon the filing of such exceptions, the party filing them shall serve a copy on the other parties and shall
50 file a copy with the Regional Director of Region 4. If no timely exceptions are filed, the Board will adopt the recommendations set forth herein.